Public Prosecutor v Mohamad bin Wahab

HIGH COURT (KUALA LUMPUR) — CRIMINAL REVISION NO 43–15 OF 2000
AUGUSTINE PAUL J
30 NOVEMBER 2000

Criminal Procedure *— Transfer of cases — Power of Public Prosecutor — Transfer from sessions court to magistrate's court — Whether Public Prosecutor authorized to make application for transfer — Federal Constitution art 145(3) — Subordinate Courts Act 1948 s 104*

On 5 May 2000, Mohamad bin Wahab was charged in the sessions court at Kuala Lumpur for an offence under s 304 of the Penal Code. The case was called up for mention and the deputy public prosecutor applied for it to be transferred to the magistrate's court. The learned sessions court jugde accordingly transferred the case. The learned magistrate entertained doubts about the sessions court's power to transfer cases to the magistrate's court and wrote to the High Court to consider, in the exercise of its powers of revision, the validity of the transfer. The sessions court judge was of the view that the Public Prosecutor was authorized to make an application for transfer under art 145(3) of the Federal Constitution ('the Constitution') and that she was empowered to make the order under s 104 of the Subordinate Courts Act 1948 ('the Act').

Held, setting aside the order of the sessions court judge:

(1) On s 104 of the Act, a sessions court judge may transfer a case only to another sessions court and a magistrate may likewise transfer a case only to another magistrate's court. In other words, a court may transfer a case only to another court of co-ordinate jurisdiction. The reliance by the learned sessions court judge on s 104 of the Act in making the order of transfer was therefore wrong in law (see p 69B–C).

(2) On art 145(3) of the Constitution, transfer of proceedings is a matter for which special legislation must be enacted as provided by art 145(3A) of the Constitution. No special law has, however, been enacted to authorize the Public Prosecutor to require the transfer of a case from a higher court to a lower court. In the absence of any such law having been passed, the order of transfer made by the learned sessions court judge was therefore wrong in law (see p 69E–F).

[Bahasa Malaysia summary

Pada 5 Mei 2000, Mohamad bin Wahab telah dituduh di mahkamah sesyen di Kuala Lumpur dengan suatu kesalahan di bawah s 304 Kanun Keseksaan. Kes tersebut dipanggil untuk sebutan dan pada masa itu, timbalan pendakwa raya telah memohon supaya kes tersebut

dipindah ke mahkamah majistret. Hakim mahkamh sesyen memindahkan kes tersebut ke mahkamah majistret. Majistret yang arif berasa ragu terhadap kuasa mahkamah sesyen di dalam pemindahan kes tersebut dan telah menulis surat kepada Mahkamah Tinggi supaya Mahkamah Tinggi dapat menggunakan kuasa semakannya untuk menentukan sama ada pemindahan kes tersebut adalah sah atau tidak. Hakim mahkamah sesyen berpendapat bahawa Pendakwa Raya mempunyai kuasa untuk membuat permohonan untuk pemindahan kes di bawah perkara 145(3) Perlembagaan Persekutuan ('Perlembagaan') dan hakim mahkamah sesyen diberi kuasa untuk membuat perintah sedemikian di bawah s 104 Akta Mahkamah Rendah 1948 ('Akta tersebut').

Diputuskan, mengetepikan perintah hakim mahkamah sesyen:

(1) Di bawah s 104 Akta tersebut, hakim mahkamah sesyen dibenarkan memindah kes ke mahkamah sesyen yang lain dan majistret dibenarkan memindah kes ke mahkamah majistret yang lain. Mahkamah hanya dibenarkan memindah kes ke mahkamah yang lain yang setara dengannya. Hakim mahkamah sesyen yang menggunakan s 104 Akta tersebut di dalam pemindahannya telah khilaf dari segi undang-undang (lihat ms 69B–C).

(2) Di bawah perkara 145(3) Perlembagaan, pemindahan prosiding memerlukan perundangan yang khas, seperti yang dinyatakan dalam perkara 145(3A) Perlembagaan. Sehingga kini, tiada perundangan yang khas yang telah diperbuat yang membenarkan Pendakwa Raya memohon untuk memindahkan kes dari mahkamah yang tinggi ke mahkamah yang rendah. Oleh yang demikian, perintah hakim mahkamah sesyen adalah salah dari segi undang-undang (lihat ms 69E–F).]

Notes

For cases on transfer of cases generally, see 5 *Mallal's Digest* (4th Ed, 1997 Reissue) paras 3173–3205.

Cases referred to

Cotton Spinning and Weaving Mills Co Ltd v State of Uttar Pradesh AIR 1961 SC 1170 (refd)

Foo Loke Ying & Anor v Television Broadcasts & Ors [1985] 2 MLJ 35 (refd)

Khan Chand v State of Punjab AIR 1966 Punj 423 (refd)

Nadarajah v PP [2000] 4 MLJ 373 (refd)

Legislation referred to

Criminal Procedure Code s 177

Federal Constitution arts 145(3), (3A)

Subordinate Courts Act 1948 s 104

Appeal from: Arrest Case No D82–1–2000 (Magistrate's Court, Kuala Lumpur)

Azhar bin Abdul Hamid (Attorney General's Chambers) for the applicant.

Khalek bin Awang (*Khalek Awang & Associates*) for the respondent.

Augustine Paul J. : This revision proceeding before me brings into focus the power of a sessions court to transfer a criminal case pending before it to the magistrate's court on the application of the public prosecutor.

On 5 May 2000, one Mohamad bin Wahab was charged in the sessions court at Kuala Lumpur for an offence under s 304A of the Penal Code. When the case was called up for mention, the deputy public prosecutor applied for the case to be transferred to the magistrate's court as it falls within the jurisdiction of the latter court. The learned sessions court judge accordingly transferred the case to the magistrate's court. When the case was brought before the learned magistrate, he entertained doubts as to whether the sessions court had the power to order the transfer of the case to his court and whether he could, in such circumstances, proceed to hear the case. He promptly wrote to the High Court to consider, in the exercise of its powers of revision, the validity of the order of transfer that had been made. I decided to review the order since it is a matter of considerable significance as it relates to the jurisdiction of the subordinate courts. I then fixed a date to hear arguments from both parties and also invited the learned sessions court judge to furnish the reasons pursuant to which she had ordered the transfer. Her reasons, in substance, are that the public prosecutor is authorized to make the application for transfer under art 145(3) of the Federal Constitution ('the Constitution') and that she is empowered to make the order by s 104 of the Subordinate Courts Act 1948 ('the Act').

I shall first consider s 104 of the Act which reads as follows:

> A sessions court judge or a magistrate shall have jurisdiction in any criminal cause or matter, whether or not he has jurisdiction finally to hear and determine the same, to order, in any case where the interests of justice so require, that the cause or matter be transferred to any other sessions court or magistrate's court, as the case may be, which in his opinion has jurisdiction to hear and determine the same, and the same may be continued in that other court accordingly.
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> Provided that nothing in this section shall be deemed to confer jurisdiction on any court to which a proceeding is so transferred, if that court would not otherwise have jurisdiction in respect thereof.

The learned sessions court judge, in making the order, had acted under the impression that s 104 of the Act permits her to do so. If this interpretation is correct, it means that the courts to which a case can be transferred are alternatives which are available to the court making the order of transfer with the result that a sessions court judge may transfer a case either to another sessions court or to a magistrate's court. In order to understand s 104 of the Act in its proper perspective, it is imperative that all the words

used in it be taken into account. One of the fundamental principles of statutory interpretation is that it must be presumed that every word used in a statute has been inserted with a purpose and a meaning must be assigned to it. Thus in *Cotton Spinning and Weaving Mills Co Ltd v State of Uttar Pradesh* AIR 1961 SC 1170 it was held that the courts always presume, while interpreting statutes, that the legislature inserted every part thereof for a purpose and the legislative intention is that every part of the statute should have effect. Similarly in *Foo Loke Ying & Anor v Television Broadcasts & Ors* [1985] 2 MLJ 35, Abdoolcader SCJ in delivering the judgment of the (then) Supreme Court said at p 43:

> The court however is not at liberty to treat words in a statute as mere tautology or surplusage unless they are wholly meaningless. On the presumption that Parliament does nothing in vain, the court must endeavour to give significance to every word of an enactment, and it is presumed that if a word or phrase appears in a statute, it was put there for a purpose and must not be disregarded. In *Quebec Railway, Light, Heat and Power Co Ltd v Vandry* [1920] AC 662, Lord Sumner in delivering the judgment of the Judicial Committee said (at p 676):
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> > 'Secondly, there is no reason why the usual rule should not apply to this as to other statutes — namely, that effect must be given, if possible, to all the words used for the legislature is deemed not to waste its words or to say anything in vain.'
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> The Judicial Committee applied and followed this case in *Enmore Estates Ltd v Darson* [1970] AC 497 (at p 506).

With this background in mind, it must be observed that s 104 of the Act permits a sessions court judge or a magistrate to transfer a criminal case to another sessions court or magistrate's court, ' … as the case may be … ' ('the phrase'). The phrase appears to have a determinative effect on the court to which a case can be transferred. What therefore requires consideration is whether the phrase permits the making of an order of transfer by either a sessions court judge or a magistrate to the two courts as alternatives. In explaining the meaning of the phrase and thereby the scope of s 104 of the Act, I can do no better than refer to *Khan Chand v State of Punjab* AIR 1966 Punj 423 where Narula J said at p 433:

> Keeping the above principle in view, we must assume that the legislature has deliberately used the well-known expression 'as the case may be' in the proviso in question with some definite purpose and intent. This expression necessarily means that at least two situations are envisaged by the earlier part of the section and two separate provisions or alternatives are provided in a later part of the same subsection to one of which the one alternative and to the other of which the other is intended to be applicable. The expression 'as the case may be' cannot permit the application of the same alternative to both the contingencies or vice versa. It is implicit in the use of this phrase that one out of the various alternatives would apply to one out of the various situations and not otherwise.

The phrase is thus used in s 104 of the Act with a definite purpose. Its object is to restrict the power of transfer of the court making the order to only one of the two courts to which a case can be transferred, whichever is

appropriate and applicable, and not to both as alternatives with a discretion to choose either one of them. The court to which a case can be transferred will be determined by the court making the order for transfer. It is dependent on whether the order for transfer is made by a sessions court judge or a magistrate. The order for transfer is then made to the appropriate court . Thus, a sessions court judge may transfer a case only to another sessions court and a magistrate may likewise transfer a case only to another magistrate's court. In other words, a court may transfer a case to only another court of co-ordinate jurisdiction. This is precisely what para 3(2) of the Third Sch to the Act provides in the following words:

> Power, on application or of its own motion, to transfer any proceedings to another court of co-ordinate jurisdiction.

The reliance by the learned sessions court judge on s 104 of the Act in making the order of transfer is therefore wrong in law.

The remaining matter for consideration is whether art 145(3) of the Constitution authorizes the public prosecutor to require a case that has been initiated in the sessions court to be transferred to a magistrate's court. I have considered that provision in some detail in *Nadarajah v PP* [2000] 4 MLJ 373. As I said in that case, it is only concerned with the power of the public prosecutor to institute a prosecution in a particular court which has jurisdiction to hear the case. It does not deal with the transfer of a prosecution that has already been instituted. Transfer of proceedings is a matter for which special legislation must be enacted as provided by art 145(3A) of the Constitution. Thus s 177 of the Criminal Procedure Code which requires a magistrate to transfer a case to a higher court if the application is made by the public prosecutor must be construed as such special legislation. No special law has, however, been enacted to authorise the public prosecutor to require the transfer of a case from a higher to a lower court . In the absence of any such law having been passed, the order of transfer made by the learned sessions court judge is therefore wrong in law.

I must add that in the argument before me the learned deputy public prosecutor conceded that the order made by the learned sessions court judge cannot be supported. He accordingly applied for the case to be re-transferred to the sessions court for further action by the public prosecutor . In the upshot, I set aside the order made by the learned sessions court judge and ordered that the case be transferred back to the sessions court.

Order of the sessions court judge set aside.

Reported by Chew Phye Ken